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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

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To: The Commission

REPLY COMMENTS OF BELLSOUTH

BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Cellular Corp., BellSouth Wireless, Inc., and Mobile Communications Corporation of America (collectively "BellSouth") hereby submit their response to the Commission's *Second Further Notice of Proposed Rule Making*, FCC 94-191 (July 20, 1994), 59 Fed. Reg. 37734 (July 25, 1994) (*"SFNPRM"*), in this proceeding.

I. INTRODUCTION

In the *SFNPRM*, the Commission sought comment on whether management agreements, resale agreements, and joint marketing agreements should be considered attributable interests for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS-cellular cross-ownership rules, or any general commercial mobile radio service ("CMRS") spectrum cap the Commission might adopt.[1/] (*SFNPRM*, ¶ 4). BellSouth

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1/ On August 9, 1994, the Commission issued a news release announcing that it had adopted a *Third Report and Order* in this proceeding completing the regulatory framework for CMRS. Specifically, while the Commission stated that it was "unnecessary to establish the broad spectrum cap applicable to all CMRS services," it concluded that the goal of a competitive CMRS marketplace would be achieved "by capping at 45 MHz the total amount of PCS, cellular and SMR spectrum in (continued...)

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agrees with the overwhelming majority of commenters that absent a *de facto* transfer of control to a party other than the licensee, these non-equity relationships should not be considered attributable interests.[2/] Consistent with this position, the Commission's attribution rules should not differ depending upon whether the licensee or applicant involved is a "designated entity."[3/]

II. MANAGEMENT AGREEMENTS

The Commission requested comment on whether management agreements that *do not* transfer *de facto* control to a party other than a licensee should be considered attributable interests. (*SFNPRM*, ¶ 6). BellSouth is in complete agreement with nearly all commenters that management agreements should not be attributable,[4/]

1/(...continued) which a single entity may have an attributable interest." *News Release*, "Regulatory Framework for CMRS Completed," Report No. DC-2638, at 2 (Aug. 9, 1994).

2/ Commenters directly opposed to considering management, resale, and joint marketing agreements as attributable interests include: Pacific Bell Mobile Services, NYNEX Corp., McCaw Cellular Communications, Inc., Motorola, Inc., GTE Service Corp., Cellular Telecommunications Industry Association, LCC, L.L.C., and the Rural Cellular Association. Other commenters did not address all three of these non-equity relationships, but were opposed to considering the relationships they did address as attributable, including: Nextel Communications, Inc., Southwestern Bell Corp., the National Cellular Resellers Association, and Cellular Service, Inc. Five parties were opposed to attribution to the extent it would apply to them: American Mobile Satellite Corp., Simron, Inc., PCC Management Corp., PlusCom, Inc., and Vanguard Cellular Systems, Inc. Only *one* commenter, Columbia PCS, Inc., favored treating a non-equity relationship as attributable in the case of management contracts.

3/ Designated entities are defined as "businesses owned by minorities or women (or both), small businesses, and rural telephone companies." *SFNPRM*, ¶ 3 & n.5.

4/ *See* Comments of Pacific Bell Mobile Services; Comments of NYNEX Corp.; Comments of McCaw Cellular Communications, Inc.; Comments of Motorola, Inc.; Comments of GTE Service Corp.; Comments of Cellular Telecommunications Industry Association; Comments of LCC, L.L.C.; Comments of the Rural Cellular (continued...)

absent a *de facto* transfer of control, for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS cellular cross-ownership rules, or a general CMRS spectrum cap.

BellSouth agrees that control should be the sole factor for determining attribution of non-equity relationships, and that any agreement that confers *de facto* or *de jure* control upon a party other than a licensee should be considered an attributable interest. Issues of control should be governed pursuant to existing precedent, specifically the *Intermountain Microwave*[5/] decision and its progeny. (*SFNPRM*, ¶ 5 & n.7). BellSouth has previously taken the position in the *Telephone and Data Systems, Inc.* (*"TDS"*) remand proceeding[6/] that *Intermountain Microwave* sets forth the proper general *guidelines* to follow in assessing control issues, with common sense modifications depending upon whether the entity is an applicant, permittee, or licensee.[7/]

BellSouth disagrees with Columbia PCS, Inc., which argues in its comments that recent *TDS* decisions from the Court of Appeals for the District of Columbia applying *Intermountain Microwave* "demonstrate that a brighter line is needed" to

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4/(...continued)
Association; Comments of Nextel Communications, Inc.; Comments of Southwestern Bell Corp.; *see also* Comments of Simron, Inc. and Comments of PCC Management Corp. *But see* Comments of Columbia PCS, Inc.

5/ 24 Rad. Reg. (P & F) 983 (1963).

6/ *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655 (D.C. Cir. 1994), *vacating and remanding La Star Cellular Telephone Co.*, 7 FCC Rcd. 3762 (1992).

7/ *See* Comments of Louisiana CGSA, Inc. at 3-5, in response to *Order*, FCC 94I-040, 41604, CC Docket No. 90-257 (filed May 5, 1994) ("*TDS* Remand Comments") (attached). Louisiana CGSA, Inc. is wholly-owned subsidiary of BellSouth Mobility Inc, which is a wholly-owned subsidiary of BellSouth Cellular Corp. In remanding the *La Star* case to the Commission, the Court of Appeals also vacated and remanded the *Ellis Thompson* decision. *See Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42 (D.C. Cir. 1994), *vacating and remanding Ellis Thompson Corp.*, 7 FCC Rcd. 3932 (1992).

determine *de facto* control issues.[8/] Issues of control can only be ascertained on a case-by-case basis. A rigid, unyielding formula for determining control could restrict the adduction of relevant evidence and may result in the unnecessary expenditure of Commission resources. The Court of Appeals, in handing down the *TDS* decisions, was concerned not with the validity of the *Intermountain* criteria, but rather with the proper application of those criteria, finding that the Commission had inconsistently and selectively applied the *de facto* control guidelines in *Intermountain Microwave*.[9/] The decisions in no way point to the need for a more objective test.[10/]

As noted by BellSouth in its PCS Comments, there should be no restrictions upon the eligibility of technically and financially qualified entities to participate in the provision of PCS, and CMRS in general.[11/] Such a policy of open eligibility serves the public interest by encouraging the participation of companies with a wide range of perspectives and a diversity of offerings. Artificial restrictions on entry, including the proposals to classify non-equity relationships as attributable interests, will serve only to lessen this diversity. In proposing to consider management agreements as attributable interests in the absence of a *de facto* transfer of control, the Commission was concerned

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8/ Comments of Columbia PCS, Inc. at 3.

9/ BellSouth has previously asserted that the Commission utilized *Intermountain* in deciding *La Star*, but that the criteria were improperly applied in the *Ellis Thompson* case. *See TDS* Remand Comments at 3, 9.

10/ The *SFNPRM* does not propose to change the *Intermountain* criteria for determining control.

11/ *See* PCS Comments of BellSouth at 39-43, in response to *Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking and Tentative Decision*, 7 FCC Rcd. 5676 (1992), Gen. Docket 90-314 (filed Nov. 9, 1992).

that a manager might have access to market sensitive information which could be used to impede vigorous competition where the manager was also a licensee offering a competing service. (*SFNPRM*, ¶ 6). Nonetheless, the attribution of management agreements would actually lessen competition. For example, as noted by Pacific Bell:

> [I]f a management contract is treated as an attributable interest, experienced CMRS providers who also have their own PCS licenses will be discouraged from providing that expertise to other licensees, such as designated entities, because it will limit their ability to also hold licenses. In effect, the rule would mean that those most able to assist the less experienced licensees would be discouraged from doing so. [12/]

As a result, the less experienced licensees, and designated entities in particular, lose the potential assistance necessary to make them a stronger competitor and to implement their systems.

Perhaps more compelling, a designated entity, PlusCom, Inc., commented that any expansion of the Commission's long-standing ownership criteria beyond the *Intermountain* test to classify non-equity relationships as attributable interests would "place undue restrictions on Designated Entities' ability to creatively attain financial assistance."[13/] They further note that "[t]he benefits of non-equity relationships will help Designated Entities to overcome barriers to entry and operation of PCS licenses."[14/]

12/ Comments of Pacific Bell Mobile Services at 5; *see also* Comments of Nynex Corp. at 2; Comments of Motorola Inc. at 7-8; Comments of GTE Service Corp. at 6-7; Comments of the Cellular Telecommunications Industry Association at 8; Comments of LCC, L.L.C. at 5-7; and Comments of Southwestern Bell at 7-8.

13/ Comments of PlusCom, Inc. at 2.

14/ *Id.*

Accordingly, BellSouth submits that the classification of management agreements as attributable interests will actually hamper competition, rather than protect it.

While BellSouth acknowledges the *potential* problems created by a manager of a commercial mobile radio service in a market providing competing service as a licensee in that same market, it submits that absent and until proven abuses are found to exist, current antitrust laws and state regulations governing fiduciary duties, rather than restrictive attribution rules, will serve to guard against the potential of anticompetitive practices.[15/] In addition, the Commission has previously addressed similar concerns about the potential for anticompetitive actions in an analogous situation in the cellular industry. Specifically, the Commission has approved of the industry-wide practice whereby partners in one market are competitors in another, finding no evidence of anticompetitive activity to the detriment of the public.[16/] It particularly found allegations of anticompetitive behavior in such instances to be "speculative at best."[17/] The Commission's concerns regarding the potential for anticompetitive consequences resulting from management agreements are also speculative at this point. Accordingly, BellSouth urges the Commission to reject its proposal to treat management agreements as attributable interests.

III. RESALE AGREEMENTS

The Commission also sought comment on whether resale agreements should be interests attributable to a reseller. (*SFNPRM*, ¶ 12). BellSouth is in complete

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15/ *See, e.g.*, Comments of Motorola, Inc. at 3; Comments of GTE Service Corp. at 5; and Comments of Southwestern Bell at 6.

16/ *See MMM Holdings, Inc. v. FCC*, 4 FCC Rcd. 8243, 8248 (1989).

17/ *Id.*

agreement with all parties commenting on the issue,[18/] and with the Commission's initial conclusion, that resale agreements should not be considered attributable interests for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS cellular cross-ownership rules, or a general CMRS spectrum cap. BellSouth supports the positions of the commenters that there is no basis to attribute the spectrum of the licensee to the reseller because the reseller is not engaged in the control of the resold spectrum[19/] and the reseller has no power to dictate the services offered by the licensee or the prices at which they will be provided.[20/] The Commission itself noted that resellers lack the ability to curtail the amount of service provided over spectrum since other resellers may enter into analogous relationships. (*SFNPRM*, at ¶ 13).

Further, reselling increases competition in the marketplace rather than curtailing or threatening it. The Commission has specifically found that resale activities are in the public interest[21/] since they expand the availability of communications services,

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18/ *See* Comments of Pacific Bell Mobile Services; Comments of NYNEX Corp.; Comments of McCaw Cellular Communications, Inc.; Comments of Motorola, Inc.; Comments of GTE Service Corp.; Comments of Cellular Telecommunications Industry Association; Comments of LCC, L.L.C.; Comments of the Rural Cellular Association; Comments of Nextel Communications, Inc.; Comments of Southwestern Bell Corp.; Comments of National Cellular Resellers Association; and Comments of Cellular Service, Inc.; *see also* Comments of American Mobile Satellite Corp. and Comments of Columbia PCS, Inc.

19/ *See, e.g.,* Comments of National Cellular Resellers Association at 3.

20/ *See, e.g.,* Comments of Cellular Service, Inc. at 2.

21/ *See An Inquiry Into the Use of Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 FCC 2d 469, 510-11 (1981), *modified on recon.*, 89 FCC 2d 58 (1982), *further modified on recon.*, 90 FCC 2d 571 (1982); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services,* 83 FCC 2d 167, 172, 185 & n.42 (1980).

promote the efficient use of spectrum, and enhance competition. Treating resale as an attributable interest could cause parties interested in engaging in cellular resale and the provision of PCS services to abstain from engaging in resale if such participation would hinder their flexibility to obtain PCS licenses.[22/] Accordingly, the Commission should abstain from considering resale agreements to be attributable interests.

IV. JOINT MARKETING AGREEMENTS

Finally, BellSouth agrees with all parties commenting on the issue[23/] that joint marketing agreements should not be considered attributable interests for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS cellular cross-ownership rules, or a general CMRS spectrum cap. The Commission noted that joint marketing agreements allow multiple CMRS providers to combine their resources in order to market services to consumers, which results in costs savings to the service providers in terms of direct sales and advertising which can then be passed on to consumers. (*SFNPRM*, ¶ 14). As such, the Commission's only stated concern with joint marketing agreements is that the arrangements may provide competitors access to information which could impede competition or have other anticompetitive affects. (*SFNPRM*, ¶ 16).

BellSouth agrees with the commenters that the Commission's rules and policies, and existing antitrust laws, will protect against the risk of anticompetitive

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22/ *See* Comments of Pacific Bell Mobile Services at 2-3.

23/ *See* Comments of Pacific Bell Mobile Services; Comments of NYNEX Corp.; Comments of McCaw Cellular Communications, Inc.; Comments of Motorola, Inc.; Comments of GTE Service Corp.; Comments of Cellular Telecommunications Industry Association; Comments of LCC, L.L.C.; and Comments of the Rural Cellular Association; *see also* Comments of American Mobile Satellite Corp. and Columbia PCS, Inc.

conduct.[24/] As each licensee that participates in a joint marketing agreement remains in control of its own facility(ies), it is unlikely the arrangement would allow enable a competitor to access information for anticompetitive purposes.[25/] Further, BellSouth believes that joint marketing agreements foster competition by allowing smaller, independent entities to work cooperatively in order to attain efficiencies otherwise available only to larger entities.[26/] Accordingly, BellSouth believes the inclusion of joint marketing agreements for attribution proposes is contrary to the public interest and should be avoided.

24/ *See, e.g.*, Comments of Motorola Inc. at 11; Comments of Pacific Bell Mobile Telephone at 8; and Comments of the Cellular Telecommunications Industry Association at 9 & n.15.

25/ *See* Comments of GTE Service Corporation at 10.

26/ *See also* Comments of Motorola Inc. at 10-11.

CONCLUSION

For the foregoing reasons, BellSouth submits that the public interest would be not be served by considering management agreements, resale agreements, and joint marketing agreements to be attributable interests for purposes of applying the 40 MHz limitation on PCS spectrum, the PCS-cellular cross-ownership rules, or any general commercial mobile radio service ("CMRS") spectrum cap the Commission might adopt. Accordingly, absent a *de facto* transfer of control, such proposals should be rejected consistent with the overwhelming positions of the commenters.

Respectfully submitted,

BELLSOUTH CORPORATION
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August 19, 1994

ATTACHMENT

STAMP & RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	CC Docket No. 90-257
LA STAR CELLULAR TELEPHONE COMPANY	)	File No. 27161-CL-P-83
For Construction Permit for Facilities Operating on Block B in the Domestic Public Cellular Radio Telecommunications Service in the New Orleans, Louisiana MSA	)	
and	)	
NEW ORLEANS CGSA, INC.	)	
To Amend Its Construction Permit for Facilities Operating on Block B in the Domestic Public Cellular Radio Telecommunications Service, Call Sign KNKA224, in the New Orleans, Louisiana MSA	)	File No. 29010-CL-P-83 File No. 29181-CL-P-85

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

COMMENTS

Pursuant to a Commission *Order* released April 20, 1994, Louisiana CGSA, Inc. ("LCGSA") 1/ hereby comments on the remand of the *La Star Cellular Telephone Co.* 2/ and *Ellis Thompson Corp.* 3/ cases and what further action should be taken. The Court of Appeal's rulings were based on its view

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1/ FCC 94I-040, 41604. LCGSA is the successor-in-interest to New Orleans CGSA, Inc. ("NOCGSA"), the original applicant in this proceeding. LCGSA is a BellSouth Corporation subsidiary (as was NOCGSA).

2/ *Hearing Designation Order* ("*HDO*"), 5 FCC Rcd. 3286 (1990), *Initial Decision* ("*I.D.*"), 6 FCC Rcd. 6860 (1991), *aff'd*, *Decision*, 7 FCC Rcd. 3762 (1992), *vacated and remanded sub nom. Telephone and Data Systems, Inc. v. FCC*, Nos. 92-1291, 92-1294 (D.C. Cir. March 29, 1994) ("*La Star*").

3/ 7 FCC Rcd. 3932 (1992), *vacated and remanded sub nom. Telephone and Data Systems, Inc. v. FCC*, Nos. 92-1273, 93-1192 (D.C. Cir. March 25, 1994) ("*Thompson*").

that the Commission had inconsistently and selectively applied the *de facto* control guidelines contained in *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963) ("*Intermountain*"), in these cases.

In Section A below, LCGSA advocates that the Commission clarify that it utilized *Intermountain* in deciding *La Star*, but that one *Intermountain* guideline is not relevant in a wireline eligibility setting. In Section B, LCGSA demonstrates that the Commission should reaffirm its *La Star Decision* because, after a full hearing, the evidence of record overwhelmingly established that SJI Cellular, Inc. ("SJI"), the wireline eligible partner, was not in actual control of the applicant under the relevant *Intermountain* guidelines and/or review of the entire control record. Because substantial and material questions of fact under the *Intermountain* guidelines were raised in *Thompson*, however, LCGSA submits that *Thompson* should be designated for hearing. Finally, Section C asks the Commission to confirm that the La Star applicant is wireline ineligible based on two independent grounds: (1) the record in the Maxcell Telecom Plus ("Maxcell") ownership period and (2) the record in the United States Cellular Corporation ("USCC") ownership period (August 1987 to present). *See Decision* at ¶¶ 6, 12.

A. The Commission Should Clarify That It Applied *Intermountain* to *La Star* But That One Guideline Is Not Relevant In A Wireline Eligibility Setting

In *La Star*, the Court stated that it was unable to determine whether the Commission had relied on *Intermountain* in reaching a control determination. The Court was critical of the Commission's statement that the *Intermountain* criteria "have less relevance here" and found that the FCC did not adequately explain its failure to utilize all *Intermountain* elements. *La Star*, slip op. at 4-6 (quoting *Decision* at n.13).

At the outset, the Commission should clarify that it did utilize the *Intermountain* actual control guidelines in reviewing the hearing record and finding La Star wireline ineligible. The Commission should further clarify why, in a wireline eligibility setting, one *Intermountain* element -- "does the eligible party have unfettered use of all facilities and equipment" -- is not relevant. In fact, the Court seems to recognize that this factor is not directly applicable in an applicant setting. *See La Star*, slip op. at 6. The fact is that if La Star is found ineligible based on the record evidence at the time of its application filing and thereafter, who will thereafter control the system after it is operational is irrelevant. [4/]

4/ To the extent the Commission wishes to provide a "reasonable projection," *La Star*, slip op. at 6, the evidence of record demonstrates that SJI would not have unfettered use of the operating facilities and equipment:

- Under the original joint venture agreement, USCC had negative control over hiring, firing and compensation of the general manager and/or management company. *I.D.* at ¶ 25.

- USCC was given expansive authority to handle La Star's affairs prior to operation. *I.D.* at ¶¶ 55, 58; it therefore can be reasonably inferred that USCC would continue its significant involvement once the system became operational.

- USCC signed lease extensions for La Star cell sites in its own name. *I.D.* at ¶ 72.

- USCC was responsible for all financial obligations until such time (if ever) the permit was awarded; in addition, USCC's parent provided financing and the loan was to be secured by a first lien on La Star's real property and a first security interest in its personal property (except for equipment vendor purchase money liens). *I.D.* at ¶¶ 24, 70-77.

For a further discussion of the *Intermountain* guidelines, *see infra* at 7-9.

B. *La Star* Represents a Faithful Application of the Actual Control Test While *Ellis Thompson* Does Not

The main problem observed by the Court in the two cases stems from the perceived divergent application of the *Intermountain* guidelines. [5] As the Court correctly observes, "Commission precedent declares that actual control is the touchstone of the *Intermountain* test." *Thompson*, slip op. at 12. The Court finds, however, that in *Thompson* the Commission analyzed the control allegations in terms of *theoretical* control, thereby departing from Commission precedent. *See Thompson*, slip op. at 14. On the other hand, the Court acknowledged that *La Star* was generally decided under an *actual control* test and even recognized that "on remand the FCC might reach the same conclusion." *See La Star*, slip op. at 6-7.

Because the *La Star* record satisfies the relevant *Intermountain* guidelines *and more*, the *La Star* result should be affirmed on remand. Whether the wireline eligibility/control record is viewed solely in terms of the relevant *Intermountain* guidelines, or is based on review of all relevant evidence, the result is the same -- La Star was wireline ineligible and its application was properly dismissed.

In the La Star *HDO*, the Commission set for hearing the issue of La Star's wireline eligibility and whether SJI retained *de facto* control of the enter-

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[5] *La Star* and *Thompson* are not identically postured. In *La Star*, the legal issue was wireline eligibility and whether, *after a full hearing*, the *applicant* carried its burden of proof to demonstrate that SJI was in actual and continuous control of the venture. If not, the application was dismissable at the application stage pursuant to 47 C.F.R. § 22.902(b). *See La Star*, slip op. at 2-3. In contrast, *Thompson* involved whether the *petitioner* met its burden to raise substantial/material questions as to who controlled the licensee warranting a hearing. *See* 47 U.S.C. §§ 309(d), 310(d); *Thompson*, slip op. at 4-6.

prise. The *HDO* referenced the *Intermountain* guidelines regarding the control determination; this reference, however, was not meant to restrict the relevant evidence La Star could submit to meet its burden of proof or to otherwise *limit* the scope of the ALJ's inquiry. [6/]

To be sure, in evaluating petitions alleging a *de facto* control issue based on limited facts known at the time (*e.g.*, *Thompson*), a comparison with the *Intermountain* guidelines is especially important. The guidelines are also valuable to guide the future conduct of applicants, permittees or licensees.

Once a *de facto* control case is designated for hearing, however, the control determination must necessarily be based on all relevant evidence adduced as to whether the entity in question is in "actual control" of the applicant/licensee. *Intermountain* was never meant to establish a rigid, unyielding formula which would restrict the adduction of relevant evidence. As La Star itself has recognized:

> Under FCC jurisprudence, the issue of control must be considered on a case by case basis; there is no precise formula by which all factors can be evaluated when one is confronted with questions concerning control. [7/]

6/ *See HDO* at ¶¶ 26-29, n.12. In *Intermountain*, the Commission set forth "the normal minimum incidents" of licensee control of operating common carrier facilities. On October 2, 1986, the Commission issued a *Public Notice*, Report No. CL-87-1, in the cellular context to help guide tentative selectees confronted with real party in interest/unauthorized transfer questions. The Bureau reminded all cellular applicants about the *Intermountain* "guidelines" for assessing control cases.

7/ La Star Proposed Findings of Fact and Conclusions of Law (filed April 8, 1991), at ¶ 514 (relying on *News International PLC*, 97 FCC 2d 349, 355 (1984)). At the petition to deny stage, La Star also stated: "Given the widely varying fact patterns that arise in the business world, there is no precise formula by which all factors can be evaluated when the Commission is confronted with questions of transfer of control." Reply to Petition to Dismiss and Deny the Application and Amendments of La

(continued...)

Under *Intermountain* and based on review of the relevant record evidence, the La Star application was properly dismissed. La Star had the burden of proof to demonstrate its wireline eligibility. In sworn written testimony, La Star put into issue evidence concerning SJI's conduct with regard to formation of the venture and negotiation of the original joint venture agreement (during the Maxcell ownership period); the conduct of SJI with regard to application prosecution activities during the Maxcell period; and SJI's conduct during the USCC ownership period.

Therefore, at hearing, the ALJ heard evidence relevant to who was in actual control. After hearing, Judge Chachkin concluded that "the evidence of record overwhelmingly establishes that SJI, the eligible carrier, *has never been in control of La Star.*" *I.D.* at ¶ 213 (emphasis added); *see also I.D.* ¶¶ 6-93. The few specific references to SJI involvement in the enterprise were discredited by testimony under cross-examination and comparison with other record facts. *See, e.g. I.D.* at ¶¶ 40-41, 70, 214-216; 220-222; 239; *Decision* at ¶¶ 34-37 and n.11. In turn, the Commission affirmed the ALJ's conclusion, finding that the record "amply demonstrates that SJI does not control La Star." *Decision* at ¶ 24.

To assist the Commission on remand, LCGSA provides a brief overview of some of the record evidence categorized under the relevant *Intermountain* criteria:

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[7](...continued)
Star (filed March 2, 1988), at 8; *see also Decision* at ¶ 26. La Star also recognized that the *Intermountain* guidelines were relevant to the determination of actual control.

WHO CONTROLS DAILY OPERATIONS?

- Maxcell handled application prosecution activities involving the applicant; thereafter, USCC performed many tasks required to keep the application updated. *See I.D.* at ¶¶ 33-41, 58-64, 70, 78, 80-82.

- Maxcell and USCC routinely and directly paid all ongoing La Star expenses; the minority partner also kept all books and records, all without SJI review or involvement. *See I.D.* at ¶¶ 59-62, 89-93.

- Maxcell and USCC worked with La Star agents and experts without SJI involvement. Maxcell hired La Star agents and experts and USCC continued paying and working with those agents. *See I.D.* at ¶¶ 33-38, 42-48, 58-74.

- USCC prepared and filed La Star tax returns without SJI review or involvement. *See I.D.* at ¶¶ 83-88.

- Maxcell and USCC handled cell site matters, again without SJI involvement. *See I.D.* at ¶¶ 72-75, 81.

- Maxcell, and later USCC, obtained needed financing for the proposed system. *See I.D.* at ¶¶ 39, 76-77.

WHO DETERMINES AND CARRIES OUT THE POLICY DECISIONS, INCLUDING PREPARING AND FILING APPLICATIONS?

- Maxcell provided SJI with the joint venture agreement which was to govern how the venture's affairs would be run. SJI could not get Maxcell to change any of the supermajority clauses giving negative control to minority partner over critical La Star activities including: litigation decisions, settlement matters, and the appointment, termination and compensation of the system's general manager and/or management company. *See I.D.* at ¶¶ 24-32.

- Under the joint venture agreement and direct testimony, the venture was purportedly controlled by the Management Committee, which SJI controlled. On cross-examination, it was established that the Committee was non-functional and that the required quarterly meetings were not held. *See I.D.* at ¶¶ 53-57; *Decision* at ¶ 31.

- SJI testimony reflected that Maxcell and then USCC had extensive authority to attend to La Star's affairs. There is substantial evidence that such authority was exercised with no meaningful SJI involvement or oversight. *See I.D.* at ¶¶ 33-37, 55, 58-79.

- During the Maxcell period, Maxcell personnel prepared La Star application filings. Maxcell hired counsel, engineers, agents and experts and worked with them without meaningful involvement by SJI. Thereafter, USCC worked on application matters and with agents without consultation with SJI. SJI was unfamiliar with agents hired. *See I.D.* at ¶¶ 33-39, 58-64.

- The alleged SJI six-cell design decision assertion was discredited. *See I.D.* at ¶¶ 40-41, 58-63.

WHO IS IN CHARGE OF THE PAYMENT OF FINANCING OBLIGATIONS AND WHO RECEIVES MONIES AND PROFITS? [8/]

- Maxcell, and later USCC, was in charge of the payment and in fact paid all La Star's financial obligations, including agents, without SJI oversight or review. *See I.D.* at ¶¶ 24, 58-61, 216, 219.

- Maxcell and USCC kept La Star's financial records; USCC commingled La Star system expenses and USCC expenses in the same internal license fee account, without differentiation. *See I.D.* at ¶¶ 59-62, 89-91, 216.

- USCC ignored SJI's infrequent requests for information concerning La Star expenditures. *See I.D.* at ¶ 90.

- Maxcell and then USCC were to receive first call on the profits of the system to recoup expenses advanced during the application prosecution period. Nevertheless, SJI did not monitor expenditures. *See I.D.* at ¶¶ 24, 89.

- Maxcell and USCC obtained financial commitments to build the proposed system without meaningful SJI involvement. *See I.D.* at ¶¶ 39, 76-77.

- USCC was responsible for and prepared La Star's tax returns without SJI involvement; it made unilateral elections on the returns; and listed its own address as that of La Star. *See I.D.* at ¶¶ 83-88, 219.

WHO IS IN CHARGE OF EMPLOYMENT, SUPERVISION AND DISMISSAL OF PERSONNEL?

- Under original joint venture agreement, decisions regarding appointment, compensation or termination of the system's general manager or management entity required Maxcell and later USCC's approval. *See I.D.* at ¶ 25.

- Maxcell hired and directly paid all La Star agents. USCC continued directly paying those agents, without SJI supervision. *See I.D.* at ¶¶ 33-37, 58-61.

8/ Because of space limitations, two of the *Intermountain* guidelines are combined herein.

- SJI testimony reflected that both Maxcell and USCC had open-ended authority to hire necessary personnel to prosecute the application. *See I.D.* at ¶¶ 35, 55, 63.

In sum, the *La Star* decision should be reaffirmed.

LCGSA agrees with the Court's observation, however, that *Thompson* appears to conflict with a proper application of the *Intermountain* actual control guidelines. Therefore, LCGSA submits that *Thompson* should be reviewed more closely in line with the Court's observations and that a hearing is appropriate in that case. [9] Such action, combined with affirmance of *La Star*, should satisfy the Court's concern that the actual control test was not consistently applied in the two cases.

C. The Commission Should Confirm That La Star's Application Has Been Dismissed Based On Two Independent Grounds

Another matter should be confirmed on remand. Because *La Star* put into evidence SJI's conduct during both ownership periods, the ALJ and Commission properly made control findings as to both periods. The Commission appeared to rule that the applicant was disqualified based on either the Maxcell record or USCC record evidence standing alone (*see Decision* at ¶ 25; *see also I.D.* at n.17).

Some uncertainty about this matter was created on appeal. By making independent rulings as to the Maxcell and USCC periods, the Commission will

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[9] In *Thompson*, the Court points out evidence in the record which was reviewed by the Commission based on a *theoretical* control standard. *See Thompson*, slip op. at 12-15. Based on the *actual* control standard, it would appear that a substantial and material question of fact was raised regarding control in *Thompson*.

provide the Court with a decision based on the full record in this proceeding and will assist the Court's review of the case. [10/]

Thus, because the record reflects that La Star has not carried its burden to demonstrate that SJI was in control during the Maxcell period, the Commission should reaffirm La Star's disqualification as an applicant on this basis. [11/] In addition, the Commission should reaffirm that La Star's application must be dismissed because it did not carry its burden to demonstrate SJI was in control during the USCC period.

Respectfully submitted,

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10/ The Commission's *HDO* in the TDS "*Wisconsin 8*" proceeding (59 Fed. Reg. 7673 (Feb. 16, 1994)) provides further support for independent control findings herein.

11/ It should be noted that the facts are not in dispute concerning the Maxcell period. *See* La Star's Exceptions to *I.D.*, filed December 26, 1991 at 2 n.3; USCC Exceptions at 8. *See also Decision* at ¶¶ 25, 30. Moreover, USCC itself has characterized SJI's conduct in *La Star* as "voluntary passivity." *See* TDS/USCC Statement of Issues to be Raised, filed with the Court of Appeals in *La Star* on August 12, 1992.

CERTIFICATE OF SERVICE

I, Donna M. Crichlow, hereby certify that on August 19, 1994, a copy of the foregoing "Reply Comments of BellSouth" in GN Docket 92-252 was served by First Class, United States Mail, postage pre-paid, to the following:

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